TABLE OF CASES

	Page
Chauffeurs Local 175 v. NLRB, 294 F. 2d 261, 262, C.A., D.C.)	3
International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corporation, 342 U.S. 237 (1952)	5
Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93 (1958)	6
Morton v. Local 20, Teamsters, Chauffeurs and Helpers Union, 320 F. 2d 503 (6 Cir. 1963)	1
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	2
Smith v. Evening News Association, 371 U.S. 195 (1963)	4
United Automobile Workers v. Russell, 356 U.S. 634 (1958)	2
United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954)	2

STATUTES

Labor-Management Relations Act, 1947:

Section 301	4
Section 303	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 556

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WHITE OAK COAL COMPANY, INC.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

After UMW filed its petition for certiorari in the instant case, this Court, on December 9, 1963, granted certiorari in *Morton* v. *Local 20, Teamsters, Chauffeurs and Helpers Union*, 320 F. 2d 505 (6th Cir. 1963).

Morton, like *White Oak*, was based upon application of state tort law, and, like *White Oak*, it involved questions of preemption and pendant jurisdiction. The Sixth Circuit, in giving full play to state law in *Morton* expressly relied upon its prior decision in the instant case.

We have fully discussed the *Morton* decision at pages 33 and 34 of our petition. As we there state it represents, as does *White Oak*, a practical rejection of the preemption principle, or, at the very least, an imperfect understanding of the problem.

The significant role state law plays in actions for damages against labor unions emphasizes the public importance of the Sixth Circuit decisions in both the *Morton* and *White Oak* cases. There is need to know just how far courts go in applying state law in these controversies.[1] This Court will not be presented with an opportunity to consider the entire problem or a major part of the problem in its review of *Morton*. Morton does not involve even an allegation of violence. Indeed, as we think, the Sixth Circuit's application of state law in *Morton* is wrong for reasons already discussed by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The instant case, however, does involve, among many other things, acts of violence. This Court's decisions in *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954) and *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) hold that state law is not preempted in matters of state interest involving a breach of the peace. But as we have shown in our discussion of Question No. 3 (pp. 30-35) the instant case was decided on the theory that the acts of violence corrupted UMW's entire course of conduct, and authorized a judgment for White Oak for the "total

[1] State law was applied in both *Morton* and *White Oak* on the theory that the District Court had ancillary or pendant jurisdiction of the state law claim. This question, which goes hand in hand with the question of the extent of permissible application of state law, has not been considered in a labor context by this Court.

damages sustained" during the dispute for acts "legal and illegal". This holding, we insist, is in conflict with the *Garmon* decision certainly to the extent it makes the consequences of federally protected acts the basis for damages under state law.

The Sixth Circuit decision that certain illegal acts—the responsibility for which is challenged—makes all of UMW's acts illegal, including all lawful inducements to employees to remain away from work and to vote for UMW in the NLRB election, and is assuredly in conflict with the reasoning of the Court of Appeals for the District of Columbia. The "totality of effort rule" was considered and rejected by that Court in *Chauffeurs Local 175* v. *NLRB*, 294 F. 2d 261, 262 (C.A., D.C.), stating:

> "But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere."

It is manifest that this case, alone or in conjunction with *Morton*, presents a notable opportunity to consider a problem of recurrent and increasing public importance.

II

White Oak contends (p. 27) there is no "legal authority or logical basis" for UMW's argument on preemption, insisting that state law does not yield to NLRB jurisdiction because Congress, by Section 303, Labor Management Relations Act of 1947 [29 USCA 187], devised a remedy for "substantially the same activity".

White Oak's argument not only seems fallacious, it reflects the basic misconception of the preemption

problem in the Sixth Circuit's decisions in *Morton* and the instant case. Obviously, the enactment of Section 303 was only a part of the federal scheme of regulation, which, as this Court has long since found, largely preempts the field insofar as application of state law is concerned. That Congress believed it necessary in Sections 301 and 303 to provide for suits for damages in certain instances, is no basis whatsoever to find an intention to permit application of state law, as the *Garmon* decision clearly shows.

The reliance by White Oak on *Smith* v. *Evening News Association*, 371 U.S. 195 (1963) is particularly inapposite. *Smith* does not allow for the application of state law. It is the other way around. In *Smith* a defense based upon preemption was disallowed on the theory that the claim involved was to be determined on its merits under federal law. And the possibility of conflict this Court referred to in *Smith* between the NLRB and court consideration of the same acts had to do with conflict in the application of federal law. It had nothing to do with the applicability of state law, or the possibility of conflict in concurrent application of state and federal law.

In further answer to UMW's preemption argument White Oak points out (pp. 28-29) that it did in fact invoke NLRB's jurisdiction with regard to the matters here complained of and obtained relief. White Oak apparently contends that it thereby discharged any obligation it had to submit the matter in the first instance to the Board and was thus free to maintain its action for damages. If this is the contention, White Oak has surely devised a novel twist to the preemption theory for heretofore it has been believed that in some matters the Board's jurisdiction was exclusive and in others it was not, but that in no instance was Board

action a prerequisite or an enabling step to an action for damages. Cf. *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corporation*, 342 U.S. 237 (1952).

III

UMW believes answers to White Oak's arguments of Questions No. 1 and 2 are to be found in the petition. These additional comments, however, may be helpful to the Court.

In considering the Sixth Circuit's finding of secondary boycott, it should be remembered that the only evidence of interference with truckers hauling White Oak coal occurred while the UMW contract was still in effect and while UMW members employed by White Oak were still at work. These acts of interference, which occurred in the week preceding the strike, were two in number, the first occurring at the White Oak tipple entrance and the second on a road some distance from the tipple. Involved were persons unknown. Some days later the strike commenced. On the day it began no "secondary" employees were scheduled to work, and of course there was no inducement of secondary employees on that day. Thereafter White Oak remained closed, and, in the words of its own superintendent, it was never able during the strike to get enough of the employees (virtually all of whom were then participating in union meetings and accepting union aid) to operate the White Oak mines (R. 362; see Petition pp. 8-9). In short, there was never any mining of coal after the start of the strike which would have warranted the use of secondary employees.

With this in mind, we turn to the Sixth Circuit's order on the petition to rehear which White Oak

insists we have misconstrued. From a reading of the order it is obvious that the Court was referring to those acts of interference which occurred prior to the start of the strike. It seems evident to us that the Court deemed these acts of interference prior to the start of the strike as "incidental and permissible". If the Court did not mean by this language that it did not rely upon acts other than those which occurred prior to the start of the strike to support its finding of the secondary boycott, one can only wonder why the Court went to the trouble of modifying its opinion.

It seems clear that the Sixth Circuit predicted its finding of secondary boycott on something besides these "incidental" acts which occurred prior to contract expiration. This being so the Court of necessity had in mind acts which occurred during the strike while White Oak did not have secondary employees scheduled to work. The Sixth Circuit's theory of spectacular violence thus is that because of violence elsewhere White Oak couldn't have employed secondary employees to haul its coal even had its regular employees been willing to mine coal and even had the secondary employees been asked to haul.

Considering that the prohibition of Section 303 was "narrowly conceived" and that the statute becomes applicable only when a union indulges in "specifically prohibited means of coercion through inducement of employees", it is manifest that a boycott of the type condemned was not established by the evidence. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 US 93 (1958).

IV

No useful purpose would be served in the present posture of the case to discuss the many tortured state-

ments of fact contained in *White Oak's* brief. The brief cannot obscure the fact that UMW, through lawful means induced union action by union members which resulted in affirmation of UMW's status as bargaining representative of White Oak employees. Nor can it obscure, in dwelling upon acts of violence which unfortunately occurred in this dispute which involved thousands of coal miners in the Southern Appalachian Mountain country, that UMW stands cast in judgment for the acts of persons absolutely unknown. The fact is, as we point out in our discussion of Question No. 3, the questions of agency and union participation and authorization involved in this case of necessity were decided on the basis of guess work. There can be no answer, and White Oak offers none, to the insufficiency of evidence on this aspect of the judgment.

Respectfully submitted,

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